TOWN OF DAVIE TOWN COUNCIL AGENDA REPORT

TO: Mayor and Councilmembers

FROM/PHONE: Mark Kutney, AICP, Development Services Director/(954) 797-1101

Prepared by: Annie Feng, Planner II

SUBJECT: Resolution, ExxonMobil Fuel Marketing Company/Progressive Development

Group, Inc., 2399 S. University Drive, generally located at the northwest corner of

Nova Drive and University Drive

AFFECTED DISTRICT: District 2

TITLE OF AGENDA ITEM:

A RESOLUTION OF THE TOWN OF DAVIE, FLORIDA, WAIVING THE ONE -YEAR TIME LIMIT FOR A VARIANCE DENIED PREVIOUSLY BY TOWN COUNCIL; AND PROVIDING AN EFFECTIVE DATE.

The petitioner sought variances:

- 1. **FROM:** Section 12-34 (Y)(1) of the Town of Davie Land Development Code which requires a minimum lot area of 43,560 square feet for a lot to be occupied by fuel pump islands, **TO:** reduce the lot area to 40,057 square feet;
- 2. **FROM:** Section 12-34 (Y)(2) of the Town of Davie Land Development Code which requires a minimum distance of 250 feet between a lot to be occupied by fuel pump islands and any lot of residential use; **TO:** reduce the distance from the subject property to be occupied by the proposed fuel pump islands to a residential property to 25 feet;
- 3. **FROM:** Section 12-34 (Y)(2) of the Town of Davie Land Development Code which requires a minimum distance of 250 feet between a lot to be occupied by fuel pump islands and any lot occupied for service station purpose; **TO:** reduce the distance to another gas station to approximately 200 feet;
- 4. **FROM:** Section 12-107 (D)(4) of the Town of Davie Land Development Code which requires a minimum of ten-foot landscape buffer between commercial properties and other abutting properties; **TO:** reduce the landscape buffer adjacent to the commercial property to the north to 4.9 feet.

REPORT IN BRIEF:

On the September 17, 2003 Town Council meeting, Town Council approved variances 1, 3, and 4 and denied variance 2. It has been five (5) months since Town Council denied a portion of the request.

Town of Davie Land Development Code Section 12-310 (5) states: "whenever the council has acted upon a variance for a property, whether approved or denied, the Planning and Zoning Board shall not thereafter consider any further application for the same or any other kind of variance for any part or all of the same property for a period of one (1) year. The above time limits may be waived by a majority

vote of council when the council deems such action necessary to prevent injustice or to facilitate the proper development of the city."

During last five (6) months, the applicant has met with the adjacent neighbors and received written support from the immediate neighbors (see the attached letters). In addition, the applicant is willing to make the following changes to the proposed site plan and structures (see the attached letter):

- 1. Reduce the number of gas dispensers from eight (8) to six (6);
- 2. Reduce the proposed building from 3,925 square feet to 3,200 square feet;
- 3. Reduce the height of the proposed store structure;
- 4. Provide for on-site retention through above ground retention areas, previously retention was proposed as vaulted;
- 5. Increase the landscape buffers;
- 6. Provide illumination on and off the property;
- 7. Increase the rear wall adjacent to the residential buildings from six (6) feet to eight (8) feet;
- 8. Remove the car wash from the site.

As stated above, the applicant feels that approval of the waiver request will enable reconsideration of the variance as stated on the previous page under Item 2.

PREVIOUS ACTIONS: On the September 17, 2003 Town Council meeting, Town Council approved for variance 1, 3, and 4 and denied for variance 2.

CONCURRENCES: At the August 13, 2003 Planning and Zoning Board meeting, the following motions were made:

Mr. McLaughlin made a motion, seconded by Ms. Turin, to approve Variance 1 subject to working with the adjacent property owners to provide landscaping on the other side of the access road (Motion carried 3-1 with Ms. Lee being opposed).

Ms. Lee made a motion, seconded by Ms. Turin, to deny Variance 2 (Motion carried 3-1 with Mr. McLaughlin being opposed).

Mr. McLaughlin made a motion, seconded by Ms. Turin, to approve Variance 3 (Motion carried 3-1 with Ms. Lee being opposed).

Mr. McLaughlin made a motion, seconded by Ms. Turin, to approve Variance 4 (Motion carried 3-1 with Ms. Lee being opposed).

FISCAL IMPACT: N/A

RECOMMENDATION(S): Staff finds that the subject application complete and suitable for transmittal to the Town Council for further consideration.

Attachment(s): Resolution, Justification letter and backup letters, Land use map, Subject site and Aerial map.

RESOLUTION	
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A RESOLUTION OF THE TOWN OF DAVIE, FLORIDA, WAIVING THE ONE -YEAR TIME LIMIT FOR A VARIANCE DENIED PREVIOUSLY BY TOWN COUNCIL; AND PROVIDING ANEFFECTIVE DATE.

WHEREAS, Town Council approved Variance 1, 3, 4 and denied Variance 2 for V 5-2-03 requested by Progressive Development Group, Inc./Exxon Fuel Marketing Company on September 17, 2003; and

WHEREAS, the applicant has met with the adjacent neighbors and received written support from the immediate neighbors; and

WHEREAS, the applicant desires to reapply a same variance within one-year period since Town Council denied the request; and

WHEREAS, the applicant understands that a new variance application must still be filed and is subject to Town Council action.

NOW, THEREFORE, BE IT RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF DAVIE, FLORIDA.

<u>SECTION 1.</u> The Town Council of the Town of Davie does hereby approve to waive the one-year time limit for the same variance denied previously by Town Council within one-year period;

<u>SECTION 2.</u> This resolution shall take effect immediately upon its passage and adoption.

PASSED AND ADOPTED THIS		DAY OF	, 2004.
		MAYOR/CC	DUNCILMEMBER
ATTEST:			
TOWN CLERK			
APPROVED THIS	DAY OF	, 2004	•

PRESSMAN & ASSOCIATES, INC.

Governmental & Public Affairs

Marcie:

12/22/03

Thanks for your help and direction.

Please call with any questions or concerns.

May I ask, can we speak on picking a date for this to go to Council, or e-mail is fine.

Thanks again, enjoy the holidays

requesting recursidation

Annie - please

chandle see me muces

DEC 21, 2003

28870 US Highway 19 N. • Suite #300 • Clearwater, FL 33761 Phone 727-726-VOTE (8683) • Fax 727-669-8114 • Cell 727-804-1760 • E-mail: pressinc@aol.com

PRESSMAN & ASSOCIATES, INC.

Governmental & Public Affairs

TO: The City of Davie; The Honorable Mayor and Council Members

FROM: Todd Pressman

DATE: 12/21/03

RE: Mobil Oil at Nova and University

Please accept this communication as a request for early consideration of a variance for the Mobil Oil site at University and Nova Drives. This site went thru the City process for review of variances less than one year ago and was denied. This communication seeks the support of the City Council to allow the review to occur again, but to allow that review with less than the full year that is usually required to allow re-consideration.

This request is based upon a number of different and important factors:

1) Changes to the Site Plan and Structures proposed.

- a. Reduce the number of gas dispenser locations to 6, from 8 previously proposed.
- b. Reduce the size of the proposed building to 3,200 SF, from 3,925 SF previously proposed.
- c. Reduced the height of the proposed store structure.
- d. Revised retention for on-site and above ground, where previously retention was proposed as vaulted.
- e. Increase landscape buffer, provide illumination on and off the property, increase rear wall height to 8', increased fencing, remove car wash and soap spray concerns.

2) Demonstration of Support by the Immediate Neighbors

- a. Letters of support from 4 abutting businesses (one of which is a residential rental community).
- b. Signatures of support on the issue from 93 immediately surrounding neighbors
- c. E-mail from the President of the Valencia Village Home Owner's Association confirming the unanimous vote by the Board of Directors in support of the issue.

3) American Planning Assoc. Article/Non-Conforming Uses

Article from the Planning Association that study's and directs new views on the use and existence Non-Conforming Uses.

The City of Davie, Florida:

Please accept this letter as a communication that as a very closely located neighbor to the Mobil gas station at Nova and University roadways, being directly across Nova Road, I support the improvements, investment and changes that are proposed at this Mobil station. This represents a substantial upgrade at the site, and the correction of several site issues that are intruding to the area currently. Please support these changes.

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Thank you			
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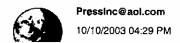
Thank you.

O nora Ca, Sente 207, Danie, FL 33324

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Thank you.



To: marcie_Nolan@Davie-fl.gov cc:

Subject: Pressman

I am following up from an earlier e-mail.

I wanted to pass by one question...that is, if the Exxon/Mobil reduced the intensity of the site that was previously planned, say reduce the size of the building and/or the number of pumps, would that constitute enough of a change that the variance that was denied (that being the variance of the distance to the residential property) could be brought back immediately, without Council approval?

Thanks.

Todd Pressman,
President,
Pressman & Associates, Inc.
28870 US Highway 19, N., Suite #300
Clearwater, FL 33761
Phone 727-726-VOTE (8683)
Fax 727-669-8114 (alternate #, 727-796-3975)
Cellular phone 727-804-1760

The requirement

Nancy Rod Berg

To: Cc: Subject:

Tom_Truex@davie-fl.gov Mike_Crowley@davie-fl.gov Exxon/Mobile variance

Dear Mayor Truex,

The Board of Directors of Valencia Village Condominum Association held their monthly meeting Septeber 9th.

At that meeting, representitives of Exxon/Mobile (Mr. Todd Pressman and Mr. Bret Neaviril) gave a presentation on Exxon's request to redesign/renovate their property at the NW corner of University & Nova Dr.

We appreciate Mr. Pressman & Mr. Neaviril for taking the time to address our members concerns on this matter.

A motion was made by Rod Berg, 2nd by Kathy McGraw to:
Accept Exxon/Mobile's variance request pending approvel by the
City of Davie building a zoning committee with Town Board
concerance.

motion passed unanimously

Please feel free to contact me concerning this matter.

Sincerly,

Rod Berg, President Valencia Village condominum Association Ros: 954-423-6678 cell: 954-296-9237

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FACSIMILE TRANSMITTAL SHEET

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TO: Todd Pressman	FAX #: 727-796-397
FROM: Rod Berg	7/29/
Valencia Village , Davie Il	
NUMBER OF PAGES IN TRANSMITTAL: 2	including this page)
FOR YOUR APPROVAL / COMMENTS	
PLEASE CONTACT UPON RECEIPT	
AS YOU REQUESTED	
D PER OUR DISCUSSION	•
SAFOR YOUR INFORMATION	
OTHER:	
Todd,	
Hope This helps.	
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Mayor TRuex & County	E-mail This Morning
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As residents and citizens closely located to the Mobil Gas Station at Nova and University Roadways, we strongly ask your support to allow the elimination of the existing gas station and allow the re-building of an improved, new Mobil station and convenience store with no car wash facility.

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DAVID M. DAVITE 2 MATADA L 954 473 5740



October 28, 2003

Mr. Todd Pressman Pressman & Associates, Inc. 28870 U.S. Highway 19 N., #300 Clearwater, FL 33761

Dear Mr. Pressman:

I am in receipt and have reviewed the Exxon/ Mobil Oil project color elevations and landscape plan at the North West corner of Nova and University.

The general area of University Drive and Nova has undergone extensive improvements over the past couple of years. These projects have only improved upon the appearance of our property. Your project would further enhance the improvements already done, both municipally as well as privately. The removal of the car wash would reduce the noise and improve that which our clients view when exiting our property by way of Nova Drive. The extensive landscape replacement would further improve the neighborhood. Solely based upon the color elevation and landscape plan you provided, we would support the aesthetic improvement of the Exxon/ Mobil Oil project.

Please keep us posted on the advancement of the redevelopment.

Sincerely, Fred Hunter Memorial Services, Inc.

Jeff D. Casey

Vice President & General Manager

Funeral Homes

Hollywood at the Cemetery Hollywood Memoriai Gardens Home 6301 Taff Street - Hollywood

Hallywood Downtown 140 S. Dixie Highway - Hallywood

Davie/Cooper City/Plantation 2401 S. University Drive - Davie

Fort Lauderdale 718 S. Federal Highway - Fort Lauderdale

Willon Manors Kalis Funeral Home 2505 N. Dixie Highway - Wilton Manors

Aaron Cremation and Burtal Services 6107 Miramar Parkway - Miramar

Cemeteries - Mausoleums Cemetery Office 6301 Tafr Street - Hollywood

Hollywood Memorial Gardens 6301 Taft Street - Hollywood

Hallywood Memorial Gardens North 3001 N. 72nd Avenue - Hallywood

Please Respond to:

Fred Hunter's P.O. Box 816969 Hollywood - FL 33081-0969

Any number reaches all locations:

Hollywood 954-989-1550
Fort Lougerdale 954-327-1550
Miami 305-624-5500
Toll Free 800-940-1550
Fax 954-987-2997



November 13th, 2003

To Whom It May Concern:

This letter is serving the purpose of stating that Cameron Cove Apartment Homes located on the corner of University Drive and Nova Drive, has no objections to an upgraded gas station being built and look forward to the enhancement of the neighborhood as long as it does not interfere with our ability to conduct our daily business.

Thank you,

Jennifer Gordon District Manager

MPC Management Corp.

7900 Nova Drive, Suite 201 • Davie, Florida 33324 (954) 452-8100 • Fax: (954) 587-5507

October 30, 2003

Todd Pressman, President Pressman & Associates, Inc. 28870 US Hwy 19 North Suite 300 Clearwater, FL 33761

Re: Exxon/Mobil Oil Project

Dear Mr. Pressman,

I have received your documentation regarding the proposed project for renovating the property located at 2399 S. University Drive, Davie, FL 33324.

MPC Management Corp. has no objection to the proposed project and would support the changes noted in the proposed site plan.

Thank you for your request. If you have any further questions, please feel free to contact me at the number above.

Respectfully,

Steven S. Rodriguez Managing Director



December 4, 2003

Pressman & Associates, Inc. 28870 US. Highway 19 N., Suite 300 Clearwater, Florida 33761

Re: Proposed Site Plan: Mobil Oil

Ladies and Gentlemen:

Thank you for the courtesy of informing us regarding the proposed changes regarding our neighbor, Mobil Oil at the corner of Nova and University, Davie, Florida.

We are in support of the improvements.

Dick Garber

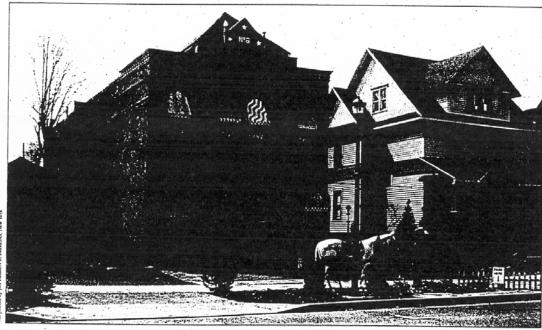
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AMERICAN PLANNING



Pigs in the Parlor or Diamonds in the Rough? A New Vision for Nonconformity Regulation

By Arthur Ientilucci



A functionally obsolete firehouse converted to a retail store that sells crafts.

ost of us who have been involved in zoning administration for any appreciable time have virtually been brought up respecting the sanctity of separation of use and accepting it as an article of faith. After all, every planner and zoner has been well schooled in *Village of Euclid v. Ambler Realty Co.* (272 U.S. 365, 47 S. Ct. 114, 71.Ed 303 (1926)), the seminal case that established the constitutionality of use district zoning. The phenomenon of the nonconformity, born and bred in Euclidean zoning, has always been seen as anathema to this doctrine. And so the theory held that for comprehensive zoning to be successful nonconformities had to be eliminated.

Time and observation have led to the realization that in spite of clear legislative intent and judicial interpretation geared toward their elimination there is a seemingly never-ending inventory of nonconformities. In fact, I have to believe there has been little real progress in eliminating nonconformities in most cities. This has caused me to think anew about regulating nonconformities. Most recently, I have been intently involved in the rewriting of a 25-year-old zoning code and have concluded, that the zoning of nonconformities should be approached much differently than it traditionally has been.

... about this article. Join us online!

From May 19-30 go online to participate in our "Ask the Author" forum, an interactive feature of Zoning News. Arthur Ientilucci will be available to answer questions about this article. Go to the APA website at www.planning.org and follow the links to the "Ask the Author" section. From there, just submit your questions about the article using an e-mail link. The author will reply, posting the answers cumulatively on the website for the benefit of all subscribers. This feature will be available for selected issues of Zoning News at announced times. After each online discussion is closed, the answers will be saved in an online archive available through the APA Zoning News webpages.

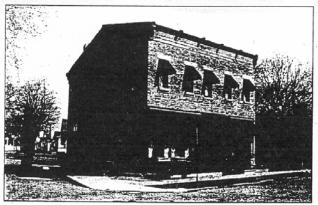
Origins of Policy

Let's take a step back. Euclidean zoning codes neatly prescribed the specific land uses that could be established in various districts throughout a community. Each and every land use would be compartmentalized and appropriately situated in a particular district where a single category of land use would be permitted. Typically, these districts were the basic three: residential, commercial, and industrial. Every residential use would be segregated into a residential zone with like uses—commercial uses with similar commercial uses and the same for industrial uses. Never the twain should meet. The main tenets of comprehensive zoning were the separation of uses for mutual protection, the preservation of property values, and the facilitation of planning efforts to achieve similar community goals. The fly in the ointment was the problem of the nonconformity.

Early drafters were concerned that the whole philosophical basis and justification for comprehensive zoning might be impaired if nonconformities were to be legitimized as part of comprehensive planning and zoning schemes. At the same time it was feared that if these nonconformities were eliminated immediately there would be

of use and building types, traditional codes worked primarily to restrict further investment in nonconformities and eventually to eliminate them. The validity of the comprehensive plan and the success of comprehensive zoning rested on their transformation to conformity or their gradual termination. Joseph Katarincic, an observer of early zoning, noted in 1963 in *Duquesne University Law Review* (Vol. 2, No. 1) that "one difficulty, and by far the most

To achieve conformity of use and building types, traditional codes worked primarily to restrict further investment in nonconformities and eventually to eliminate them.



An aging mixed-use building in the heart of a residential area is now home to a popular upscale restaurant.



An abandoned gasoline service station converted to a bakery and coffee shop in a neighborhood preservation area.

takings challenges and zoning would not be accepted by the body politic. So, the drafters of the first codes foisted a compromise. Inconsistencies were allowed to continue, but regulations were imposed that would cause them eventually to disappear. Restraints were placed on alteration, expansion, intensification, change of use, lapses of use, and restorations, all of which did not apply to permitted uses. The key words were limit, restrict, prohibit, disallow, prevent, discourage, eliminate, and terminate—all uniformly and synonymously negative. These kinds of restrictions are still found in most contemporary zoning codes. They reflect a rigidity in terms of reuse evident in both the directive to eliminate and also in the typical form of relief being the use variance, which, if approved, declassifies the nonconformity and results in its permanency.

Regulation of nonconformities has had the intention and the result of imposed uniformity. Conformity was sought as a means of avoiding potential conflict. The ultimate goal of most zoning codes has been to achieve uniformity of uses within each zoning district, which could only be accomplished by the elimination of those uses and structures that do not conform. Hence, to achieve conformity

serious, is the continuation of the nonconforming use without an effective provision for its elimination. Until some method is devised to permanently eliminate the nonconforming use from our cities and towns, effective city planning cannot be achieved." In retrospect, it seems as though it was too often conformity for the sake of conformity.

In taking this route to purge districts "clean," the restrictions have often been extremely harsh. For instance, many codes trigger abandonment of nonconforming uses when they are discontinued for a period of time, regardless of the intent of an owner or user not to abandon the use. When abandonment does occur, reuse of nonconformities is made difficult; and in many cases the use variance is the prescribed relief, with its demanding and difficult burden of proof. Flexibility in dealing with these "deviant" properties has been considered contrary to the purpose and intent of the zoning regulation and the comprehensive plan on which it is based. Homogeneity has been the goal, the purpose, and the mission.

As urban land-use controls evolved over the course of the 20th century, the players in the zoning game were continually concerned about the undesirable impacts of nonconformities. Along the way, the allowance of nonconforming uses has been characterized by the courts as a "grudging tolerance." This characterization is reflected in the many regulations that

Arthur Ientilucci is the director of zoning for the city of Rochester,

prescribe that nonconforming uses, buildings, and structures should be eliminated as quickly as possible. In fact, the traditional viewpoint is clearly that nonconformities violate the spirit of zoning laws. It was thought that the existence of nonconformities would lead to lowered property values, affect the area's desirability, and result in physical deterioration. However, what has more often been the case is that traditional regulation has fostered vacancy, with buildings falling into disrepair due to their loss of marketability. Also, property value is diminished or destroyed while the property is effectively isolated from the market, tax revenue is lost, and there is difficulty in obtaining mortgage financing and insurance. Marginal uses are encouraged to continue while owners divest, knowing there is little hope of even approximating highest and best use. Reinvestment is inhibited and discouraged as is the creativity and innovation that is often needed to restore and reuse these types of properties. There is an unavoidable negative impact on the neighborhood, ironically as a result of the very regulations that have been put in place for its protection. But are nonconformities always the "pig in the parlor?" I think not.



An obsolete industrial facility converted to loft apartments and office space near residential, commercial, and institutional uses.

Changing Perspectives

All the traditional theory and practice that have contributed to the severe restraint on nonconformities ostensibly served a purpose during the age of industrialism, where heavy, dirty industrial uses were rampant and needed to be restrained from having negative, obliterating impacts on residential areas. This was a time before the advent of comprehensive building codes, long before the information/high-tech revolutions and the advent of environmental consciousness and regulations at all levels of government. This traditional approach persisted through and fostered the era of suburbanization, with its belief system grounded in the separation of use, reverence for the single-family dwelling, and the canonization of the automobile. Zoning has sought to safeguard the future, in the expectation that time will repair the mistakes of the past. In doing so, particularly with respect to nonconformities, zoning has focused so much on protection from the undesirable that it has at the same time discouraged the activity, creativity, and vibrancy that diverse, mixed-use buildings impart to a community.

Times have changed. This is the day of efficient land use, of the reascendency of the urban form; of mixed use, high density, and diversity; of urban places complete with living, working, and recreating opportunities interwoven and designed with a focus on

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the public realm rather than on introverted private property interest. Twenty-first-century zoning should no longer dwell on how best to separate uses in the quest for uniformity but how best to blend and mix uses in the interest of harmonizing diversity. Just as the rights to nonconformities have traditionally been restricted in order to protect the community's health, safety, and welfare, why can they not be embellished with more flexibility in using, reusing,

Nonconformities in reality are not inherently bad and should be considered as potential assets for any city neighborhood rather than as prima facie detrimental.

cultivating, and recycling them to protect and enhance that same public interest? What is needed is a new outlook with respect to nonconformities—an outlook that sees them as not violating the spirit of zoning and effective land use but rather as part of the heart and soul of the urban framework.

In a nutshell, instead of restraining and eliminating nonconformities based on the false dictum of use separation, the emphasis should be on their use, reuse, and adaptation to current needs and market expressions as contributing members of the neighborhoods in which they reside. This is by no means a legal prescription, nor is it a commentary on the body of law on nonconformities such as was so apply presented here by Mark S. Dennison ("Change or Expansion of Nonconforming Uses," March 1997). Rather, as a practitioner of zoning, I am suggesting a new strategy for dealing with these zoning orphans, one that recognizes that nonconformities in reality are not inherently bad and that they should be considered as potential assets for any city neighborhood rather than as prima facie detrimental.

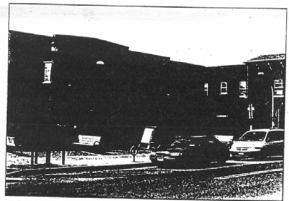
Judging in Context

Whether a particular nonconformity is a negative influence on a neighborhood is much more of a contextual issue than one of inherent problems with the nonconformity itself. It has been acknowledged that, even though a nonconformity may be thought of as a nuisance, it may simply be the right thing in the wrong place. In a more contemporary view of what creates a sense of place, nonconformities may now be considered the right thing for many places. Hence, they should be dealt with on a case-by-case basis rather than by general requirements that seek to extinguish them. Selective removal rather than blanket elimination is a concept that should underlie nonconformity regulations if zoning codes are to evolve in the direction of promoting good urban form, diversity, activity, and creating quality mixed-use urban neighborhoods.

As long as zoning exists as a land-use tool, there will be nonconformities and the unique challenges they represent. As such, nonconformities should not be uniformly perceived as problematic and requiring elimination. Certainly, some nonconformities can be detrimental to surrounding properties and community goals and should be eliminated. The conventional wisdom on the treatment of nonconformities has begun to change through the acceptance of mixed-use development districts, overlay zones, allowances for residential uses in commercial districts, and loft-type residential

conversions. It is better understood than at any time in the recent past how essential mixed use is to a lively, vibrant urban environment. Trends toward form codes and emphasis on design in recognizing the benefits of recycling buildings rather than uses also bode well for the future constructive use and reuse of nonconformities. The affording of viable opportunities for adaptive reuse of some of our cities' older, albeit nonconforming, buildings is a recognition that these unique assets can make a strong contribution to a city's vitality and sense of place.

The regulation of all types of nonconformities—nonconforming uses as well as nonconforming structures—needs to be examined through fresh eyes. However, the nonconforming structure not designed for a use permitted in the district in which it is located, whether housing a conforming or a nonconforming use, is of particular interest. The nonconforming use in the structure designed for conforming use generally has viable reuse options and can more easily be readjusted to market alignment for the use and purpose for which it was originally designed. The truly nonconforming structure type, the very different structure in the midst of structures of alternative design and purpose, has posed the



A former heavy service/industrial facility successfully adapted to a neighborhood retail use.

greatest issue and holds the greatest promise. It is these types of nonconformities that can make significant contributions to a neighborhood and afford invaluable opportunities to express the diversity of use and form that best reflect the beauty of the urban tapestry.

If the "disease" associated with nonconformities has been spread by restriction, elimination, prohibition, and termination, then the prescription for health is harmony, diversity, variety, charm, historic conservation and focus on form—the harmony of diversity. Rather than being perceived as corruptively infectious, they must represent and give rise to an infectious enthusiasm and desire to adapt, revitalize, and reuse.

Nonconforming structures provide an existing infrastructure readily capable of housing mixed-use opportunities and the diversity and interest they promote.

Process Issues

Flexibility in relief is also essential. Processes for dealing with nonconformities must afford much more flexibility to deal with their irregularity and peculiarity. These processes must involve public participation and input in decision making and also must assure continued protection for the neighborhood. Traditionally, the use variance has most often been the prescribed means of

relief to overcome the myriad of restrictions on nonconformities. This is a difficult burden of proof for the nonconforming user and also serves to make the use permanent if granted. This dilemma often nullifies neighborhood acceptance over the valid concern with lifetime vesting and permanency of use rights.

It has been acknowledged that, even though a nonconformity may be thought of as a nuisance, it may simply be the right thing in the wrong place.

In the case of expansions, intensifications, and enlargements of nonconforming uses, it is preferable to employ the area variance as the means of relief. If granted, then the approval is to expand, intensify, or enlarge the nonconformity, but the use essentially remains nonconforming as modified. It is a vehicle through which the benefits to the user can be weighed against the potential detriments to a neighborhood. At the same time it does not declassify a use as nonconforming.

With respect to reoccupancy of nonconforming uses and structures, especially in structures not designed for conforming use, the special use permit is the most attractive option. The suggestion is that this technique be employed to restore nonconforming uses to their prior, original, or lesser intensity or to reestablish a different use of similar intensity. This inherently keeps the restored use at a level commensurate with the prior use of the building and avoids excursions into more intensive uses. Special use permits are typically not permanent, as are use variances, and they offer both greater flexibility and continued controls over reuse. Special use permits also can be readily conditioned to clarify the terms of reuse and to set operational constraints as necessary to protect adjacent properties. Timelimited special permit approvals also can be employed as a means of monitoring a use over a reasonable period of time to ensure that the conditions and operational limitations are in fact accomplishing their desired goal. Specific standards for this category of special permit can be adopted that allow reoccupancy for the accommodation of neighborhood walk-to-service uses, walk-to-work opportunities, live-work spaces, and the reuse of buildings with architectural or historic value. Using the special permit at once states a legislative intent that nonconformities are permissible, as is their continued use so long as in their particular location they are not detrimental to the surrounding neighborhood. This is a far cry from grudging acceptance.

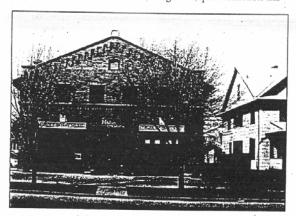
Another situation with respect to discontinuance needs to be addressed. That is the case where the nonconforming owner or user is befallen by personal circumstances, or by market or other matters that contribute to the inability to reoccupy a nonconformity within the established time period to avert abandonment of use. These may be situations where the owner or user fully intends to continue the nonconformity and is willing to maintain it and to make further investments. However, due to circumstances beyond their control, they cannot meet the codified deadline for reoccupancy. In these instances, the zoning administrator, after public notice and opportunity for comment, should be authorized to extend the time frame for abandonment. If the particular nonconformity has been problematic for the neighborhood and it is discovered that the nonconforming user has been disingenuous in an attempt to

maintain and reoccupy, then the administrator can opt not to extend the abandonment period and let the nonconformity terminate. If there is reasonable supporting data to extend the abandonment period, then perhaps a vacant building (and its associated neighborhood impacts) can be avoided.

Many nonconforming structures are old buildings and are readily adaptable for small-scale commercial and mixed uses.

The Need for Old Buildings

Codes typically permit changes of use in nonconforming buildings as long as the replacement use is restricted to the same degree as the former nonconforming use. Equal restriction has



A firehouse converted to a photography studio.

often been adjudged in terms of being or not being regulated at the same level, in terms of use district, as the preceding use. What is needed is a more realistic and definite measure of intensity. Uses and technologies change over time, today more rapidly than ever. Calibration of intensity based on district hierarchy can be deceiving and can be an inaccurate measure. Specific criteria for measuring intensity of use such as traffic, parking, employee levels, deliveries, hours of operation, noise, and odors should be codified. This will promote re-occupancy within prior intensity limits, allow for flexibility, and at the same time protect neighborhood interests.

The whole idea of a more forgiving, more flexible, and progressive view of dealing with nonconformities is in line with the tenets of smart growth and efficient land use. Many nonconforming structures are old buildings and are readily adaptable for small-scale commercial and mixed uses. As Jane Jacobs wrote in The Life and Death of Great American Cities. "Cities need old buildings so badly it is probably impossible for vigorous districts and streets to grow without them." Many nonconforming commercial and industrial buildings can be used for residential purposes and offer exciting loft-style designs marketable to a wide range of people. Nonconforming structures in neighborhoods can accommodate walk-to-neighborhood services and work

possibilities, live-work space, and more walkable, active, and interesting urban neighborhoods.

I suggest that comprehensive plans and neighborhood plans include a strategy for the use and reuse of viable nonconforming structures. Also, clearly articulated purpose statements should be included in zoning codes, enunciating a community's policy for the regulation of nonconformities and relating that policy to a preconceived plan of action. A nonconformity management plan can serve to delineate and categorize those nonconformities that are capable of contributing in a positive way to the character and needs of the community and also cite those that are incapable of contributing and warrant elimination. Just as such plans are needed to create a vision for new development, they can be useful in establishing a blueprint for the rehabilitation and reuse of existing nonconforming buildings.

It is important to view the nonconformity supply of a city prospectively as having potential for reuse and added value. Planning and promoting accordingly will encourage private-market building decisions to factor in the potential of nonconformities with an eye toward creative, profit-yielding reuse and adaptation. This kind of planning effort lays the foundation for discretionary decision making and substantiates and supports selective treatment over categorical elimination. Processes used to employ regulations and facilitate plans associated with nonconformities should be flexible but also must afford a reliable measure of certainty.

In Rochester, New York, we have chosen to embark on a new approach to the regulation of nonconformities. It is based on many of the ideas expressed in this article and is evident in our 2003 zoning code. It is one that seeks to use our man-made urban resources most efficiently. I believe we are headed in the right direction and that time and experience will prove just how valuable these diamonds in the rough can be.

A copy of the Rochester, New York, nonconforming uses ordinance is available to *Zoning News* readers by contacting Michael Davidson, Editor, *Zoning News*, American Planning Association, 122 South Michigan Avenue, Suite 1600, Chicago, IL 60603, or send an e-mail to mdavidson@planning.org.

NEWS BRIEFS

Can D.C. Require a University to House Its Students on Campus?

George Washington University (GWU) and the District of Columbia's Board of Zoning Adjustment (BZA) have been duking it out for years. An ever-increasing enrollment requires university students to look off-campus for their housing, most often in the nearby Foggy Bottom and West End neighborhoods. The BZA is concerned about protecting the residential character and stability of those neighborhoods and requires a special exception for a university use in areas zoned residential or special purpose.

The special exception process is a two-step review. The university is required to submit a campus plan that describes its general intentions for new land uses. After the plan is approved, the BZA reviews individual projects to determine whether they are consistent with the plan. The Campus Plan 2000 was approved with several conditions that GWU challenged in federal district court. The conditions include a requirement that the university house its freshmen and sophomores on campus as well as providing oncampus housing for at least 70 percent of its students. Another condition imposed an enrollment cap tied to the university's supply